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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 504 MISC.

JOHN HENRY TUNE,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

CHARLES V. WEBB, JR.,
Prosecutor for the County of Essex,
New Jersey,

C. WILLIAM CARUSO,
Special Legal Assistant Prosecutor,
On the Brief.

CHARLES V. WEBB, JR.,
Essex County Court House,
Newark 2, New Jersey,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Official Reports of Opinions Delivered in the Court below.*

The opinion of the Supreme Court of New Jersey, the Court immediately below, which affirmed the judgment of conviction in the County Court of Essex County, New Jersey, is officially reported at *17 N. J. 100, 100 A. (2nd) 99*; and the opinion of the Supreme Court of New Jersey

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*Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the Court below, defendant's appendix as it was submitted to the New Jersey Supreme Court.

holding that petitioner was not entitled to a pre-trial inspection of his confession is officially reported at *13 N. J. 203, 98 A. (2nd) 881*, reversing the determination of the Essex County Court officially reported in *24 N. J. Super. 428, 94 A. (2nd) 695*.

II.

Counter-statement Concerning Jurisdiction.

Counsel for petitioner states (petitioner's brief pp. 1-2) without any elaboration, that the jurisdiction of this Court is invoked under 28 U. S. C. sec. 1257 (3).

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involving the questions presented in the petition are in conformity with the provisions of the Federal Constitution(1) respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

III.

Counter-statement of the Case.

The petitioner, John Henry Tune, hereinafter referred to as the defendant, was tried and convicted on March 5th, 1954, in the Essex County Court, before the Honorable G. Dixon Speakman and a jury, of murder in the first degree without recommendation of life imprisonment, and on

(1) Constitution of the United States, Amendment XIV, Section 1.

March 15th, 1954, the Court imposed the death sentence. The indictment was in the usual common law form, charging in substance, that on August 22nd, 1952 at Irvington, the defendant did "wilfully, feloniously, and of his malice aforethought, kill and murder William Prather," etc.

The trial commenced on February 15th, 1954 and consumed twelve days.

The theory of the prosecution was that the murder was committed in the perpetration or attempted perpetration of sodomy or robbery, or both.

Deceased, William Prather, 33, lived with his wife and children at 517 South 21st Street, Irvington.

Defendant (petitioner herein), 23, lived with his wife and two children at 488 Bergen Street, Newark.

On the afternoon of August 22nd, 1952, defendant met the deceased at what is known as the "Famous Door Tavern," at 29 Bedford Street, Newark. Following are the events in the tavern, according to defendant's confession, Exhibit S-39 (D1178a to 1187a).

Defendant "had two drinks with him" (D1180a-33). He said, "I was short of money and I decided I was going to steal some money from Bill" (D1180a-33). Deceased had his car "parked in front of the tavern" (D1187a-7). While they were drinking, a girl named Naomi Boyd came in and joined the deceased and defendant at the bar, and deceased paid for her drinks (D1180a-35). Defendant asked the deceased for the keys to his car "so I could get into his car and drive him somewhere where I could get his money" (D1180a-36). When Naomi Boyd heard defendant ask the deceased for his keys, "she took Bill's keys away from him" (D1180a-39).

Naomi Boyd testified that she had been in the tavern before the deceased came in "around 3:30 or 4" (D245a-31); that defendant came in "about an hour or an hour and a half after we were in there together" (D246a-26); that defendant "asked Prather for a drink" (D247a-21); that "Prather was paying for the drinks himself because he had just changed a $10 bill" (D247a-28); that defendant "ran his hand in his (Prather's) pocket to try to take his keys," and she "reached and snatched the keys away from him," saying to defendant, "Don't take the boy's keys" (D247a-34 to 41).

According to defendant's statement, he walked out of the tavern and "stood in the street"; that deceased later left the tavern and asked the defendant to "come with him" (D1181a-5-6); that deceased got behind the wheel of his car and Naomi Boyd got in the front seat with him; and defendant got into the rear seat; that deceased drove Naomi Boyd to the vicinity of her home on Morris Avenue, and thereafter defendant "got into the front seat with Bill and we drove away" (D1181a-33).

Defendant said, "I still wanted to get Bill's money from him so I decided that if I got him a girl that he would go to bed with his clothes off, and I could get his money out of his clothes" (D1181a-34).

They drove to 28 Ridgewood Avenue and then to 99½ Avon Avenue where defendant went to the apartment of a friend of his, Helen Watson, to retrieve a radio which he had previously loaned to her. When he returned to the car, deceased "was asleep behind the wheel"; defendant made him "move over"; and defendant "started to drive" (D1182a-33). While driving over Barclay Street, defendant "sideswiped several cars" (D1182a-40). Later he noticed

"the smell of burning rubber"; he stopped to investigate and he noticed a front fender rubbing against the tire. With the help of deceased, they "pulled the fender away from the wheel" by pounding the fender with two pieces of concrete which defendant picked up from the street (D1183a-5 to 11). Thereafter, deceased resumed driving and he drove the defendant to deceased's home in Irvington.

Defendant said, "It was dark" at the time. Deceased led the way "up an alleyway", and into the cellar of deceased's home. There deceased "put some lights on" and they both went into a "small room with a sofa in it" and deceased turned off the light in the room (D1183a-12 to 24). He said, "both of us kept very quiet. I had understood while we were driving up to the house that Bill wanted to have unnatural relations with me and I went along. I went along because I was interested in getting the money away from him" (D1183a-29 to 33).

In his written confession, defendant gave the following account of the events in the cellar on his commission of the crime (D1183a-34 to 1184a-35):

> "The light in the cellar down the rear was still on. The room was small. As soon as Bill put the light out in the cellar room he began to play with me. He started to feel my privates. He had opened the fly of my trousers and was handling my privates. While he was doing this he was undressing himself. When my privates 'got hard' I opened the top button of my trousers, opened my belt and let my pants drop. I could see a little in the room because of the light in the rear of the cellar. He was naked from his shirt down or his hips down. He got on his knees and put his arms and head on the sofa. I put my

privates into his rectum. I then began to think about how to get the money. I took my belt from my trousers. I put it around his neck to choke him. I twisted the belt and choked him. When I started to choke him I did not intend to kill him. I merely intended to make him unconscious so that I could steal his money. I kept twisting the belt until he became limp. Then I let go. When I let go he fell to the floor. He seemed to be lying on his side. I went through his clothes which were on the floor. From one of his trousers pockets I took a wallet. From another pocket I took two sets of keys. I remembered that I had seen him carry money in his socks. When he got undressed he took his shoes off but left his socks on. I took both his socks off and searched him and found nothing. There were two duffel bags on the floor. I rummaged around in them seeing if there was any money in them but found nothing. There was also a green valise in the room. I tried to open it but couldn't get it open. I then went to the stairway leading into the cellar. When Bill and I came into the cellar I saw him put his hands on the wall and feel around. I thought he was hiding his money. That is why after I choked him I went back to the entrance of the cellar. I found nothing there."

Thereafter, defendant tried to put the light on but he could not. He left by way of the alleyway alongside the house. He went to deceased's car and tried to open it with the keys he had taken from deceased's clothes to get his radio, but he could not open the car (D1184a-36 to 1185a-6).

Then he went to deceased's house by the front entrance and rang the front doorbell. A lady (the deceased's wife) responded and when she told him she was "Bill's wife," he "told her Bill had been in an accident on Elizabeth Avenue and needed $20.00" (D1185a-15 to 18). He said

the lady "refused to give it to me and I gave her a set of keys to prove that I was telling the truth" (D1185a-19).

Mrs. Edna Prather, wife of deceased, testified for the State that on the night of August 22nd, she was awakened from her sleep by the ringing of her doorbell "between 12 and 12:30," that upon opening the front door there was "a man standing there," who said to her that her husband "had a wreck on Elizabeth Avenue and for me to send him $20.00," and when she said she "didn't have $20 to send him," the man "turned around and walked out" (D135a-22; 136a-15; 137a-5, 19). Mrs Prather identified the defendant in the courtroom as that man (D137a-23 to 138a-8).

At the time, John Thomas Dixon, with his wife and daughter occupied a portion of the Prather apartment on the first floor of 517 South 21st Street. He testified for the State that he retired at about midnight; he was aroused at about 12:15 by the ringing of the front doorbell (D317a-17), and, in substance, he corroborated Mrs. Prather on the conversation she had with the defendant (D317a-319a). He identified the defendant in a lineup the following afternoon in Newark police headquarters as the man he had seen talking with Mrs. Prather in the vestibule of her home (D323a-12 to 17). Alarmed at her husband's failure to come home Mrs. Prather telephoned a friend, Rayfield Thrasher, who arrived at the Prather home in his car "between 3 and 3:30," the early morning of August 23rd (D140a-20). Thrasher drove Mrs. Prather in the immediate vicinity to look for her husband. They discovered the deceased's car "About five or six houses up the street", "parked on the side" (D140a-31). Thrasher got out, looked at it, and "found his fender was bent" (D364a-27); and when he looked in, he "saw a radio and two stones" (D364a-29).

Mrs. Prather returned to her home and went to bed. The following morning she left the house to go to work in the company of John Dixon. She walked with him to the bus station. On the way, she stopped to look into her husband's car and she "saw a radio and two stones was in the front seat of the car" (D141a-39).

Dixon also looked inside the car and saw "Two big bricks, large bricks, and a radio in the front seat" (D321a-7). He took a pillow from the back seat and "tried to cover the radio and the articles I saw" (D321a-22).

Mrs. Prather changed her mind about going to work and she returned to her home (D142a-28). She spoke to Mrs. Cora Filmore, a lady employed in the Prather household then engaged in feeding the Prather children in the kitchen (D142a-33). Mrs. Prather "went down to the cellar," and she noticed "all of my doors were open, the cellar doors that go down to the basement" (D142a-36). She noticed the "big door was opened and the baby stroller was against it to hold it open" (D142a-39). She went up to call Mrs. Filmore and they both returned to the cellar, where she noticed that "The duffel bag and the luggage that belonged to Mr. Dixon were setting out in the middle of the cellar" (D143a-9). She went into the small room, the bin, and there she discovered her husband's body "across the floor" (D143a-16). She "shook him" (D145a-22). Then she "called the police", "around 9 o'clock" (D145a-11, 13). Mrs. Filmore, who went to the cellar with Mrs. Prather, testified that she "looked in that bin" and saw Prather's body (D201a-35).

According to defendant's written confession, he "looked into Bill's wallet and saw there was no money there" (D1185a-24); and as he was walking "down Springfield

Ave" he "tore up the wallet and its contents and threw it bit by bit into the street. I also threw a set of keys I had taken from Bill into a cellar grating" (D1185a-31 to 34).

John W. Herfurth, who lived at 14 Harrison Place, Irvington, about a block and a half from the Prather home, found the deceased's wallet and social security card on Sunday morning, August 24th, in the driveway of his home "against the coping on the side of the driveway" about 15 feet from the sidewalk; and he found the wallet in front of his home, in between the rock-garden, about 5 or 6 feet from the sidewalk (D400a-30 to 402a-21). He turned the articles over to the police, and they were received in evidence as Exs. S-29 and 30 (D404a-33).

In his statement, defendant said the next day he told his wife, "I had croaked a man" (D1185a-35). He also said he spoke to a "Phyllis" who lived in his apartment and told her, "I had croaked a man" (D1186a-16).

Phyllis McNair, the lady he referred to, testified for the State that she had a conversation with defendant the following morning in which he admitted to her, he "believed he had killed a man last night," and he told her, "he was down in the basement and that he believed he had killed a man with his belt, that he had on the man's belt" (D418a-36 to 419a-11).

William B. Stargell, who worked with defendant for the same employer, testified that he saw and talked with defendant on the morning of August 23; that they had some drinks together; and that defendant said to him, "I believe I killed a man last night" (D46a-40), and "I think I killed a [obscene word omitted] last night" (D427a-22). In response to Mrs. Prather's call, the first officers to arrive on the scene were Irvington Radio patrolmen Jerry Podolak

and Edward O. O'Connor. They saw the body and felt it, and observed it was lifeless (D208a-33 to 40; 219a-39 to 220a-9). Officer Podolak observed that some of the drawers in the chifferobe "had been partly opened" (D209a-24); and the head of the deceased "was partially under the chest of drawers" (D209a-22).

Officer O'Connor observed "several articles of clothing scattered around the room;" that the head of deceased "was partially under the chest of drawers;" and that "the other drawers were slightly ajar" (D220a-16, 21, 29). He was present when the body was removed "between 10:30 and 11 o'clock" (D222a-32).

After removal of the body, Officer O'Connor found "A leather belt" (D222a-24), "on the left-hand side of the couch in the rear," indicating the spot as the northwest corner (D222a-35 to 223a-15). Defendant was shown the belt when he gave his written confession, stating, "My belt, the one I choked Bill with is a leather belt, snakeskin in color," and he initalled it and dated it (D1187a-13).

Defendant made the following statement in his confession with respect to his and the deceased's belt: "There I explained to the officers how I choked Bill with my belt. I also explained how in the darkness I had reached for my belt around Bill's neck but got Bill's belt instead" (D1186a-37).

Dr. Homer D. Schaaf, assistant County Medical Examiner, arrived at the Prather cellar at 10:00 A. M. After examining the body and noticing marks on the neck, he determined that death was due to strangulation (D106a-7 to 16), either by "hanging" or by "ligature", stating that "There was no possibility at all that this could have been a suicide, in my opinion" (D107a-24 to 40).

He performed an autopsy at 12:45 P. M. at Manger's Morgue (D113a-27), and found that death was "due to strangulation by ligature" (D113a-23) because of "horizontal furrows on the neck," a "fracture of a part of the Adam's apple," a "fracture at the base of the right greater cornu of the thyroid cartilage" (D112a-6).

The day following the autopsy he was handed defendant's belt by Deputy Graef of the Irvington police department (Ex. S-22), which had been found in the bin by Officer O'Connor after the removal of the body. Dr. Schaaf put the belt around the deceased's neck to find whether it could have produced the marks on the neck, and he stated, "In my opinion there was a perfect fit" and that it could have produced the marks (D117a-17).

During the autopsy, Dr. Schaaf examined the anus of deceased and found a "forcible stretching of it," "three fresh lacerations in the skin which makes up the surface of the anus;" the lacerations were parallel, two of them measuring $\frac{1}{4}$ inch, and one $\frac{1}{8}$ inch in length (D114a-23 to 31), and he gave it as his opinion that they "were compatible with the lesions which you could expect in sodomy" (D115a-16). He stated "it would be highly improbable" that the lacerations were caused by passage of a stool, and that "it was more likely a stretching would have to be external because of the multiplicity of the lacerations" (D184a-15 to 25).

Defendant was taken into custody at about 4:00 P.M. of August 23rd on Bedford Street in the vicinity of the Famous Door Tavern by Detectives Spina and Norris of the Newark police, Sergeant Tompkins of the Irvington police and Detective Gross of the County Prosecutor's Office, and he was immediately taken to Newark police headquarters for questioning.

At Newark headquarters Detective Spina had the defendant remove his shirt, sport jacket and belt, a "standard procedure in any cases where we have homicide suspects" (D509a-5). Detective Spina talked with him at that time for "15 minutes" (D448a-30). During the course of that conversation, the detective asked the defendant about the events that occurred the night before, and defendant yelled, "All right, all right; I killed a mother fucker last night, and I would do it again. He should have been dead seven years before he was born" (D829a-34 to 830a-9). When the detective asked him why he did it, defendant replied, "He wanted to do the bar dance, and I got mad. So I killed him." Detective Gross asked him if he used the belt taken from defendant at the time (the deceased's belt, received in evidence as Ex. S-32), and defendant replied, "No. That is the mother fucker's belt" (D830a-32), and that he had left the belt which he had used "in the mother fucker's house" (D830a-35). Detective Spina asked the defendant what the "bar dance" was, and defendant explained to him he had learned it in the prison he had been an inmate of, that whenever a person wanted to have an unnatural intercourse committed upon him he would place his hands overhead and shake his lower posterior (D831a-10).

The above admission was made by defendant in Newark Police Headquarters soon after defendant's arrest in the presence of Newark Detectives Spina and Norris, Detective Gross of the Prosecutor's Office and Sergeant Tompkins of Irvington (D831a-32).

Thereafter, Deputy Chief Graef of Irvington was contacted.

Deputy Chief Graef and Sergeant Miller of the Irvington police arrived at Newark headquarters with defendant's belt (Ex. S-22) at about 5:00 P. M. Chief Graef questioned the defendant about that belt and defendant "stated it was his belt" (D660a-40).

Beginning at about 7:00 P. M., during the police investigation, defendant was placed in several lineups, and he was identified by Mrs. Prather and John Dixon as the man who had rung the doorbell at the Prather apartment the previous night, when defendant returned a set of car keys to Mrs. Prather and made the request that she give him $20 on the pretext that her husband had been involved in an accident.

Lieutenant Leon Neidorf of the Homicide Squad of the County Prosecutor's Office arrived at Newark headquarters shortly after 7:00 P. M. and he talked with defendant "No more than 10 minutes" (D663a-7).

At about 8:30 P. M., Lieutenant Neidorf and Detective Gross of the Prosecutor's Office and Deputy Chief Graef of Irvington drove the defendant to the premises where the alleged crime was committed, 517 South 21st Street, Irvington (D663a-25). There they were joined by Lieutenant Rentschler, Irvington police photographer, and Sergeant Miller and Detective Tompkins of the Irvington police. The police and the defendant were in the basement of the premises "for a half to three-quarters of an hour" (D664a-30), during which time the defendant gave a reenactment of the manner in which he committed the murder; and photographs were taken, Exs. 18, 19 and 20 (D1173a, 1175a, 1177a).

At about 9:30 P. M., defendant was taken to the Irvington Police Headquarters by Lieutenant Neidorf, Deputy

Chief Graef and Detective Gross (D664a-40 to 665a-11), and they went to Deputy Chief Graef's office on the second floor. Defendant was first served some food, and the detectives went out for their food and returned to headquarters at about 11:00 P. M.

A written statement was taken from defendant (Ex. S-39), by Lieutenant Neidorf, beginning at 12:20 A. M. and completed between 3 and 3:30 A. M. of August 24 (D666a-21 to 32).

After completion of the statement, on the afternoon of August 24, at about 3:00 P. M., defendant was interviewed by an impartial citizen-witness, Mr. William T. Hope. The interview lasted from "shortly after 3 o'clock" until "shortly before 5" (D598a-20). The witness asked the defendant "if he made those statements of his own volition, and he said that he did;" he asked him "if he had been bounced around," and defendant "just grunted, and he said no" (D598a-8 to 13). He stated the defendant read his statement "aloud," and that it took him "three-quarters of an hour" to read it (D604a-36 to 40).

Defendant's written statement (Ex. S-39) was admitted by the Court as a voluntary statement and read to the jury (D877a-37 to 887a-11).

The defense was a general and specific denial that he killed the deceased or that he committed or attempted to commit sodomy or robbery.

Defendant's story on the witness stand was, briefly, that on the afternoon of August 22 he "did a lot of drinking" at different taverns; that he met the deceased in the Famous Door Tavern and deceased offered to take him home; that when defendant accepted the invitation Naomi

Boyd was seated in the front seat and deceased drove her home; that deceased then drove defendant to the home of a friend named "Jonathan" (Jonas Ramsey) where defendant drank more liquor; that thereafter defendant again met the deceased in his car and deceased again insisted that he take the defendant home; that when he got into deceased's car "another fellow was sitting in the front seat" alongside the deceased while defendant sat in the back seat; that defendant had never met "this fellow" before; and defendant fell asleep in the back seat; that deceased had an accident with his car on Avon Avenue; that defendant stopped and got out of the car at the home of his friend Helen Watson on Avon Avenue and he got his radio back; that he was again picked up by the deceased who insisted that he take the defendant home, and defendant again got into the car and sat in the back seat; that while riding along, "this fellow" in the front seat with the deceased asked to see the radio and defendant passed it up to him, and defendant again fell asleep in the back seat. He said he awoke when "we were in front of a house," and he didn't know whose house it was or where; that he got out of the car and went with deceased and "this fellow" into the basement of the house and "into a little room" where there was "a day bed or sofa in there"; that when the deceased and "this fellow" went into another room the defendant went to sleep; he didn't know how long he slept; and when he awoke he made his way out of the basement into the street; that he then started walking until he got to Springfield Avenue and eventually he got to his home.

The next morning he noticed he had a strange belt, saying, "I didn't know whose belt it was," nor how or when he got it (D937a-30 to 37). He "went to Bedford Street

and tried to find the fellow I had been with the night before," "To get my belt back," and he "went to see Prather," the only one he knew (D937a-40 to 938a-13). Soon after he was picked up by the police.

He said he told the same story to the police; and he denied making any incriminating statements, as testified to by them. He said he had been subjected to police brutality in Newark police headquarters, but not in the Irvington headquarters.

He admitted two previous criminal convictions in Richmond, Virginia; for assault and battery for which he was sentenced to one year, and for house-breaking and larceny for which he was sentenced to two years (D697a-36 to 698a-19).

He made a categorical denial of all incriminating statements contained in his written statement; he denied he had made any statements concerning the killing, or of any attempted sodomy or robbery of the deceased; and he stated he signed the statement only after threats were made by the police that his wife, who was then pregnant, would be beaten and locked up.

In cross examination, when asked to explain the presence of the deceased's belt on him, he stated, "I can't explain how it go on," and when asked about his own belt being missing, he said he didn't notice anyone removing his belt while he was asleep (D985a-30 to 986a-21).

IV.

Summary of the Argument.

We respectfully submit:

First: The Court's refusal to allow to defense counsel a pre-trial inspection of petitioner's confession was not a denial of due process.(2)

Second: There was no violation of due process in the taking of petitioner's confession; and the law of New Jersey on the respective duties of the Court and jury with respect to confessions is not violative of due process.

a. As to the petitioner's confession.

b. As to the New Jersey procedural rule that the trial judge passes on the competency and admissibility of the confession and the jury determines its weight and credibility.

Third: There was no violation of due process in the trial Court's refusal to charge certain requests or in the charge as given on the jury's function in recommending life imprisonment as the punishment.

Fourth: There was no denial of due process in connection with petitioner's cross examination of State's witness Naomi Boyd.

Fifth: Petitioner was not deprived of a fair trial because of the alleged avowals of fairness on the part of the prosecution during the trial.

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(2) The Essex County Court had permitted such pre-trial inspection of petitioner's confession (*State v. Tune*, 24 N. J. Super. 428, 94 A. 2d 695), but the Supreme Court of New Jersey reversed the County Court (13 N. J. 203, 98 A. 2d 881).

Sixth: The cross examination of petitioner's wife was not improper; the evidence admitted by the Court was not incompetent or prejudicial; and there was no denial of a fair trial.

V.

ARGUMENT.

POINT ONE.

The Court's refusal to allow to defense counsel a pre-trial inspection of petitioner's confession was not a denial of due process.

It is the established rule in New Jersey that a defendant has no absolute right to an inspection of his confession prior to trial, and an application for such pre-trial inspection is addressed to the trial court's sound discretion. (*State* v. *Cicenia*, 6 N. J. 296, 1951).

This is what the Supreme Court of New Jersey said in the instant case in 13 N. J. 203, 218 on the subject of pre-trial inspection of a defendant's confession:

> "We can well understand the desire of defense counsel to see the confession in every case particularly where the defendant after having made the confession finds on reflection it is better for himself to forget it. But the wishes and convenience of defense counsel are not the test. This question of the right of the defendant to a pretrial discovery of his own confession is not a novel problem for this court, the same point having been raised in State *v.* Cicenia, 6 N. J. 296 (1951), where the court unanimously held:

"'A defendant has no unqualified absolute right to an inspection of his confession. On the contrary, his application for an inspection is addressed to the sound judicial discretion of the trial court to be exercised only as the interest of justice may require and with the thought in mind that the question of the admissibility of the confession is always a matter for determination at the trial.' (At page 301).

"Although some courts refuse to permit inspection in any circumstances, 20 Tulane L. R. 133, our rule appears to be consistent with that of many other jurisdictions, State *v.* Haas, 188 Md. 63, 51 A. 2d 647 (Ct. App. 1947); People *v.* Skoyec, 50 N. Y. S. 2d 438 (Sup. Ct. 1944); State *v.* Leland, 190 Ore. 598, 227 P. 2d 785 (Sup. Ct. 1951), affirmed 343 U. S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302."

In the instant case, the trial Court had at first granted petitioner's request for a pre-trial inspection of his confession. (*State* v. *Tune*, 24 N. J. Super. 428, 94 A. 2d 695). But on appeal by the State, the Supreme Court of New Jersey reversed the trial Court's order and held that under the circumstances of the case there was no justification for any inspection and the trial Court had failed to exercise sound discretion in ordering an inspection. Thereafter, petitioner made a second application to the trial Court for such pre-trial inspection, defense counsel claiming, as they do here, that their client had denied to them that he had committed or attempted to commit sodomy upon the deceased, that counsel "were in the dark" on whether sodomy was connected with the case, that an inspection of the confession would have determined the necessity for the assistance of a psychiatrist or psychologist who would be able to confront the petitioner with his confession and determine whether "abnormal personality characteristics"

existed as a factor in the case. The trial Court denied petitioner's second application, and the refusal was raised as one of the questions in the appeal before the New Jersey Supreme Court. The trial Court had permitted the petitioner to be examined by a psychiatrist before trial at state expense; the psychiatrist made his examination but defendant denied to him that he had committed or attempted to commit sodomy.

It is to be noted that petitioner's confession (Ex. S-39) was admitted by the trial Court into evidence on March 2nd, 1954 (D822a-19) and the defense rested its case on March 4th, 1954. Had defense counsel so desired, they had ample opportunity to use the confession in connection with any psychiatric examination of petitioner for the avowed purpose indicated in their pre-trial application for inspection of the confession, the refusal of which was claimed before the New Jersey Supreme Court and is now claimed before this Honorable Court to have been a denial of a fair trial and due process of law.

Defense counsel made no motion for a recess at the time the confession was received in evidence, nor did they request the trial judge for sufficient time in which they could have a psychiatrist confront the petitioner with his confession and submit expert testimony.

There was no expert testimony submitted and apparently petitioner's counsel abandoned any such idea of psychiatric examination and offer of expert testimony, and they chose to proceed on a defense of intoxication.

We respectfully submit the Supreme Court of New Jersey properly disposed of this question as follows (17 N. J. p. 109):

"At the argument of this motion the defense was apprised categorically of the fact 'that the evidence clearly indicated that there was sodomy connected with the case.' Certainly the defendant knew whether there was or was not and the trial court authorized defense counsel to retain a psychiatrist, at state expense, to examine the defendant before trial. True, the defendant denied to the psychiatrist that he had committed or attempted to commit sodomy, but when the confession was admitted in evidence at the trial there was no motion for a recess to allow the psychiatrist to confront the defendant with that confession and again examine him.

"We held in our prior decision in this case that a defendant has no absolute right to an inspection of his confession prior to trial and that an application for such an inspection is addressed to the court's sound judicial discretion, citing State *v.* Cicenia, 6 N. J. 296 (1951). We adhere to that rule and in the instant case can find no abuse of discretion, nor that any such abuse had led to 'unfairness' at the trial which deprived the defense of the use of psychiatric opinion regarding the defendant's state of mind at the time of the commission of the crime.

"The defense interposed at the trial that the defendant's senses were befuddled, that his faculties were made prostrate by intoxication so that he was incapable of forming or entertaining an intention to kill. There was never any such defense interposed such as is now sought to be made use of. The confession itself was complete in details and together with the re-enactment of the crime lent little or no support to the defendant's claim of intoxication."

Under this Point, petitioner cites and quotes from cases which are either inapplicable or uncontrolling.

Avery v. *Alabama*, 308 U. S. 444, 60 S. Ct. 321 (1st degree murder with death sentence) (B. 17, 23) involved the trial court's refusal to grant to defendant a postponement of the trial, and it was held that under the circumstances of the case there was no denial of defendant's constitutional right to assistance of counsel.

In *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55 (rape carrying death sentence) (B. 17, 21), there was a clear violation of the constitutional right to assistance of counsel, such conclusion being inevitable because of defendants' youth, ignorance and illiteracy together with presence of a hostile public sentiment, failure to allow a reasonable time and opportunity to secure counsel and close surveillance of defendants by military forces.

Leland v. *Oregon*, 343 U. S. 790, 72 S. Ct. 1002 (1st degree murder with death sentence) (B. 17, 21-22) would seem to support the respondent's contention. There one of the questions raised was the trial court's refusal to make available to defense counsel before trial one of defendant's confessions for purpose of study in preparation for the defense of insanity, and it was held that there was no denial of due process since the confession was admitted in evidence several days before the defendant rested his case which afforded to counsel and expert witnesses ample opportunity to study the confessions. This is the significant portion of this Court's opinion (p. 1009 of 72 S. Ct.):

> "While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addi-

tion the trial judge offered further time for that purpose but it was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession."

POINT TWO.

There was no violation of due process in the taking of petitioner's confession; and the law of New Jersey on the respective duties of the Court and jury with respect to confessions is not violative of due process.

We shall discuss under this point the subjects contained in petitioner's Points II and III.

a. As to the petitioner's confession.

The manner of the procurement of petitioner's confession was not raised before the New Jersey Supreme Court.

Petitioner now claims the confession was procured in a manner contrary to the standards laid down by this Court in *Watts* v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1434; *Harris* v. *South Carolina*, 338 U. S. 68, 93 L. Ed. 1440; and *Turner* v. *Pennsylvania*, 338 U. S. 62, 93 L. Ed. 1443.

We submit the facts of the manner of the procurement of the confession in the instant case cannot possibly be compared with those in the above cases.

In the *Watts* case, *supra*, there were six days of long periods of interrogation by relays of officers, which was undisputed. In the *Harris* case, *supra*, there were three days of vigorous interrogation by relays of officers in stifling heat. In the *Turner* case, *supra*, the defendant was held incommunicado for four days with long periods of

constant interrogation. It was not only these long periods of interrogations but additional conditions and circumstances recited in each of those cases which impelled this Court to determine that the confessions were procured under improper and oppressive methods declared to be violative of the rule of "fundamental fairness".

In the instant case, the crime was committed in the late hours of August 22nd, or early morning of the 23rd. Petitioner was taken into custody on the afternoon of the 23rd and taken to Newark Police Headquarters where, after short questioning, he admitted to police officers, "All right, all right; I killed a ———— ———— last night and would do it again. He should have been dead seven years before he was born" (D829a-34 to 830a-9). The same night, at about 8:30, he was taken to the scene of the crime where he re-enacted it. Then he was taken to Irvington Police Headquarters where he was given food. At about 12:20 A.M. of the 24th his written confession was begun to be taken down by Lieutenant Neidorf of the Prosecutor's Office and completed between 3:00 and 3:30 A.M. (D666a-21). On the afternoon of the 24th, he was questioned at some length by an impartial citizen-witness (Mr. Wm. T. Hope) who asked petitioner if he made the statements in his confession of his own volition and "he said that he did"; when asked if he had been "bounced around" by the police, petitioner "just grunted and said no" (D598a-8); and the witness testified that petitioner read his confession "aloud", taking about three-quarters of an hour to do so.

Petitioner charged he was subjected to police violence in Newark Police Headquarters but not in Irvington Police Headquarters.

The State submitted abundant evidence in support of the voluntariness of petitioner's oral statements and written confession through the testimony of Detective Spina (D447a-14); of Prosecutor's Detective Gross (D467a-28; 473a-31; 474a-24; 477a-11; 484a-10); of Detective Norris (D515a-35); of Detective Tompkins (D529a-27; 531a-11; 541a-22); of Detective Miller (D522a-9); of the citizen-witness Hope (D598a-7); of Deputy Chief Graef (D624a-10); and of Prosecutor's Detective-Lieutenant Neidorf (D667a-27). All of the above police officers testified to the voluntariness of petitioner's oral admissions and written confession and that they were not extorted by any threats of violence or by any direct or implied promise of benefit or hope of gain or reward, and in strict accordance with accepted principles of "fundamental fairness".

A criminal complaint was made against petitioner on August 24th and he was arraigned before a Magistrate on the morning of August 25th, less than two full days after his arrest.

In his Brief (p. 25), petitioner makes the statement that, "The New Jersey Supreme Court has placed its own interpretation on the *Watts*, *Harris*, and *Turner* cases and, as we conceive it, its construction does not conform to what has been clearly stated by this Court," citing *State* v. *Vaszorich*, 13 N. J. 99, *State* v. *Pierce*, 4 N. J. 252, and *State* v. *Grillo*, 11 N. J. 173, cert. den. 345 U. S. 976, 73 S. Ct. 1123. We do not agree with the above statement.

Petitioner's oral admissions and written confession were received in evidence in accordance with the established rule in New Jersey that, in order to be admissible, a confession must be proven to have been voluntarily given,

(*State* v. *Cole*, 136 N. J. L. 606, cert. den. 334 U. S. 851, 68 S. Ct. 1503; *Roesel* v. *State*, 62 N. J. L. 216; *State* v. *Young*, 67 N. J. L. 223), and also in accord with the rule in the Federal courts which was stated by Chief Justice Fuller in *Wilson* v. *U. S.*, 162 U. S. 613, 40 L. Ed. 1090 as follows:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

The rule in New Jersey on this question is in full accord with the holdings of this Court as enunciated in *Lyons* v. *Oklahoma*, 322 U. S. 586; *Chambers* v. *Florida*, 309 U. S. 227; and *Lisenba* v. *California*, 314 U. S. 219.

In addition, the courts of New Jersey have also adhered to the rule of "fundamental fairness" laid down by this Court in the *Watts*, *Harris* and *Turner* cases, *supra*, as demonstrated by *State* v. *Cooper*, 2 N. J. 540 (1949), wherein it was held that, not only is it incumbent upon the State to show that the confession is freely and voluntarily given, uninduced by either hope or fear or other considerations leading to something else than the truth, but to sustain the measure of testimonial truthworthiness the inquiry must include whether or not there is "that fundamental fairness essential to the very concept of justice."

When measured by the standard of "fundamental fairness" there is nothing in the record of the instant case to indicate that petitioner's confession was procured by other than fundamentally fair means on the part of the investigating officers and prosecuting authorities.

b. As to the New Jersey procedural rule that the trial judge passes on the competency and admissibility of the confession and the jury determines its weight and credibility.

A reading of petitioner's argument under his Point III would seem to indicate that his quarrel is not so much with the procedure adopted by the trial Court, which was in accord with established New Jersey law, but with the law itself as it has been followed in New Jersey for many years.

The nub of defendant's argument appears in his statement (B. 32 bottom): "We claim that the procedure followed, though ostensibly designed to protect a defendant from the consequences of the admission of incompetent evidence, results in such fundamental unfairness to a defendant that it has no place in a judicial system that has for its objective a fair trial."

In the instant case, the State submitted its evidence on the voluntariness of defendant's oral statements and confession, in the presence of the jury with the consent of defense counsel (D451a-452a).

After all the evidence on voluntariness on both sides was completed, defendant moved, out of the presence of the jury, for rejection of all of the State's evidence (D806a-22 to 811a-40).

The Court denied defendant's motion, and after the jury returned to the courtroom, the Court announced its ruling that the written confession (Ex. S-39) was a voluntary statement as well as defendant's oral statements made at Newark and Irvington headquarters and at the scene of the crime during the re-enacement by defendant, and it received in evidence the written confession as well as Exhibits

S-18, 19 and 20 (pictures taken in deceased's cellar at the time of the re-enactment) (D822a-16 to 823a-23).

The Court announced to the jury at the time that, "I will, of course, charge you further on this subject when the case is submitted to you on all the evidence" (D822a-24).

In its final charge, the Court plainly told the jury that it could reject the confession if they found it was not voluntarily given and that it was not true, as follows (D1138a-21):

> "Now, with respect to this statement which has been marked Exhibit S-39 I made a preliminary finding that the statement or confession was voluntarily made and should be admitted in evidence, but that finding on my part does not mean that you must believe that the statement is true. On the contrary, as I previously stated you are the sole judges of the facts. If you find that the statement or any part of the statement is not in fact true, you may reject that part which you find to be untrue in fact and completely disregard that part.
>
> "Now, in your consideration of the truth of that statement you may consider all the evidence in the case, *including the evidence which was presented in connection with its voluntariness* which was presented before you and which you heard. If after hearing and considering and comparing all that evidence you find that the confession or any part of it was untrue in fact, then you should completely disregard it.
>
> "Now, I further charge you, that if you find that the entire confession, Exhibit S-39, is untrue in fact, and that all the statements made by the defendant to the various police officers which have been testified

to here are untrue in fact, then I charge you that you must render a verdict of not guilty, because outside the confession or those statements there is insufficient evidence in the case for the jury to render a verdict of either murder in the first degree under the theory the State advances, or murder in the second degree.

"On the other hand, if you believe the statement or sufficient parts of the statement to satisfy you beyond a reasonable doubt that the defendant did commit the crime charged that you will render your verdict accordingly, depending upon what degree of the crime you find the defendant committed." (Italics ours.)

The procedure adopted and the law as applied by the Court in the instant case was in full accord with the rule established in many of the New Jersey decisions, and particularly with the principle reaffirmed in the recent case of *State* v. *Vaszorich*, 13 N. J. 99 (1953), wherein it is stated (p. 109 of opinion, bottom):

"* * * it is settled in this State that since the determination whether or not a confession is voluntary governs its competency to be received in evidence, the factual determination whether it is voluntary should in the first instance be made by the court consistent with the principle that matters of the competency of evidence are exclusively for the court to decide. It was, therefore, not error upon receipt of the confession in evidence to leave to the jury only the question of the credibility of the confession, to believe, or not, the facts set out therein. State *v.* Cole, 136 N. J. L. 606 (E. & A., 1948), cert. den. 334 U. S. 851, 68 S. Ct. 1503, 92 L. Ed. 1773, 334 U. S. 862, 68 S. Ct. 1519, 92 L. Ed. 1782 (1948); State *v.* Foulds, 127 N. J. L. 336 (E. & A., 1941)."

See, also, *State* v. *Walker*, 15 N. J. 485 (1954), where it is said (p. 490):

> "The test is whether the confession, under the given circumstances, was voluntarily made. Its competency is primarily for the trial judge, and the weight to be given it is determined by the jury."

With respect to defendant's claim that our confession-law results in such fundamental unfairness to a defendant that it has no place in a judicial system that has for its objective a fair trial, we deem the following statement in *Wigmore on Evidence* (3d. Ed.), Vol. III, sec. 867, p. 359, entirely appropriate:

> "Future of the Doctrine. In conclusion two considerations not often kept in mind must be emphasized.
>
> "In the first place, the only real danger and weakness of a confession—the danger of a false statement—is of slender character and the cases of that sort are of the rarest occurrence. No trustworthy figures of authenticated instances exist; but they are concededly few. Now if it were a question of receiving the confession as conclusive, i. e., an equivalent to a plea of guilty, we might well prefer to be extremely cautious (as under the early traditional practice already described), and let the trial take its ordinary course. But as it is a mere matter of giving or not giving one more piece of evidence to the jury, as it is impossible to determine beforehand the real weight of any confession, and as the accused has ample opportunity of offering any facts affecting the weight of the confession, it is entirely unnecessary to bar out all confessions whatever by broad and artificial tests, merely on account of this slender and rare risk of falsity. To employ an anomalous occur-

rence as the basis of indiscriminate exclusion is not reasonable. It is simply, in the language of Chief Justice Paxson already quoted, an exhibition of sentimentalism toward the guilty.

"Again, the notion that confessions should be guarded against and discouraged is not a benefit to the innocent, but a detriment. A full statement of the accused person's explanations, made at the earliest moment, is often the best means for him of securing a speedy vindication. The circumstances of suspicion may often be disposed of by a simple explanation, so clear and convincing that immediate release follows as a matter of course; while the clues which the innocent accused may be able to furnish will be equally serviceable in securing that evidence against the real culprit which a delay may frequently render unavailable. When the officers of justice find confessions indiscriminately discouraged and rebuked by the judge, the effect of an enforced silence on the part of accused persons is likely on the whole to be to the disadvantage of the innocent.

"The policy of the future, then, should be to receive all well-proved confessions in evidence, and to leave them to the jury, subject to all discrediting circumstances, to receive such weight as may seem proper. The advent of a fourth stage in the history of confession-law may be thought to be indicated in the repeated protests, already quoted, against the excesses of the bygone practice."

We submit the New Jersey Supreme Court properly disposed of this question when it said, 17 N. J. on p. 113:

"The argument here is nothing more than a quarrel with the law on the determination as to whether or not a confession is voluntary. The defendant makes no claim that there was error in this regard under the law as it has existed in this State for years

but says that the 'procedure followed, though consistent with our cases on the subject and ostensibly designed to protect a defendant from the consequences of the admission of incompetent evidence, results in such fundamental unfairness to a defendant that it has no place in a judicial system that has for its objective a fair trial.'

"The State submitted its evidence on the voluntariness of the defendant's oral statements and confession in the presence of the jury with the consent of defense counsel. The court determined on the evidence that the confession was voluntarily made and admitted it in evidence. It instructed the jury that because the confession was admitted in evidence did not mean that the jury should take it as the truth, that they were the sole judges of the facts, and that if they found that the statement in its entirety or any part of it was not true in fact that they might reject it *in toto* or any part thereof which they found to be untrue and completely disregard it. This was consistent with the settled law that the voluntariness of a confession, its competency, is primarily a question for the trial judge. The function of the jury is to determine the truth of the facts as contained therein and the weight to be given it. State *v.* Cole, 136 N. J. L. 606 (E. & A., 1948), *certiorari* denied 334 U. S. 851, 68 S. Ct. 1503, 92 L. Ed. 1773; 334 U. S. 862, 68 S. Ct. 1519, 92 L. Ed. 1782 (1948); State *v.* Vaszorich, 13 N. J. 99 (1953); State *v.* Walker, 15 N. J. 485 (1954). There was more than sufficient evidence to support the determination of the trial court that the confession was voluntarily made. The charge of the court followed and was consistent with the rule in this State as stated in State *v.* Compo, 108 N. J. L. 499, 503, 504 (E. & A., 1932); State *v.* Foulds, 127 N. J. L. 336, 339 (E. & A., 1941); State *v.* Cole, supra; State *v.* Bunk, supra."

POINT THREE.

There was no violation of due process in the trial Court's refusal to charge certain requests or in the charge as given on the jury's function in recommending life imprisonment as the punishment.

At the trial, petitioner submitted the following requests to charge, refusal of which is claimed to be a violation of due process:

> "21. It is the law of this State that every person convicted of murder in the first degree shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed. I charge you that if you find the defendant guilty of murder in the first degree your verdict must be unanimous in reaching a conclusion that the defendant shall suffer death. A determination on this question shall not be by a majority vote but it must be unanimous.
>
> "22. Under the law of this State every person convicted of murder in the first degree shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence recommend life imprisonment, in which case this and no greater punishment shall be imposed. I charge you that if you are satisfied beyond a reasonable doubt that the defendant is guilty of murder in the first degree you cannot bring in such a verdict unless you have by unanimous vote, upon and after the consideration of all the evidence, agreed not to recommend life imprisonment as part of such verdict.

> "23. No juror should join in a verdict of guilty of murder in the first degree without a recommendation of imprisonment for life, if he is convinced upon and after the consideration of all the evidence that death should not be inflicted."

Under Request No. 21, defendant would have the Court charge that a verdict of guilty of first-degree murder (without recommenation of life imprisonment) must be by unanimous vote of the jury; under No. 22, that if the jury are satisfied beyond a reasonable doubt that defendant is guilty of first-degree murder (without recommendation), they cannot bring in such a verdict unless they have unanimously agreed not to recommend life imprisonment as part of their verdict; and under No. 23, that no juror should join in a verdict of guilty of first-degree murder (without recommendation) if he is convinced upon and after a consideration of all the evidence that the death penalty should not be inflicted.

The Court first instructed the jury it could attach to a verdict of guilty of first-degree murder a recommendation of life imprisonment, as follows (D1142a-8):

> "The question of any recommendation is exclusively within the province of the jury; by that I mean that if there should be a finding of guilty of murder in the first degree, the question of whether or not there should be a recommendation of life imprisonment is one which the Court has nothing whatsoever to do with and must be decided by you upon and after a consideration of all the evidence in the case, and if you do determine to make such a recommendation it must be included as a part of your verdict."

On the subject of unanimity, it charged (D1144a-14):

> "This is a criminal case, and therefore any verdict rendered by you, whether it be a verdict of guilty or not guilty, must be a unanimous verdict."

The jury returned a verdict of guilty of murder in the first degree while perpetrating sodomy and robbery, without a recommendation of life imprisonment (D1148a-15).

The jury was polled, and each member affirmed it to be his individual verdict (D1148a-23).

Defendant's counsel then requested that the jury be polled to determine whether or not each juror was in favor of a recommendation of life imprisonment (D1149a-29), which the Court refused (D1149a-34).

The question raised here was finally determined in *State* v. *Bunk*, 4 N. J. 461 (1950), cert. den. 71 S. Ct. 25, 340 U. S. 839, 95 L. Ed. 615, wherein it was held that the trial court has no power or right to make any comment or give any advice with respect to a recommendation contemplated by the New Jersey statute other than to advise the jury that the matter rests entirely and fully with the jury in its discretion to make a recommendation of life imprisonment upon and after a consideration of all the evidence.

In the *Bunk* case, the requests submitted were substantially the same as those submitted here, and in disposing of the question, the New Jersey Supreme Court quoted the following excerpt from *State* v. *Cordasco*, 2 N. J. 189, 201 (1949), which in turn was taken from *State* v. *Molnar*, 133 N. J. L. 327, 335 (E. & A., 1945), p. 475 of the *Bunk* opinion:

> "The character of the sentence is not an issue for trial. The issue of guilt or innocence and, as always, only proof relevant to that issue is admis-

> sible. The statutory punishment for first degree murder is death, subject only to the condition that the jury in its absolute discretion chooses to recommend imprisonment at hard labor for life; a recommendation that shall not be made, however, except after a consideration of all of the evidence and by incorporating the recommendation in the verdict of guilt. If that condition does not arise, the penalty is death, and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation of life imprisonment. * * * "

And on page 476 of the *Bunk* opinion it is stated:

> "* * * Following our procedure, therefore, the Legislature having provided the penalty for the crime that penalty naturally follows upon the rendering of the verdict of guilty. Again, under the statute, if the jury decides to give clemency to the defendant to the limited extent permitted by the statute they can by their verdict attach such a recommendation. Before that recommendation can be attached it must be agreed upon unanimously by the jury or else it does not become effective. In other words, the purpose of the jury is to determine guilt, the punishment being fixed by legislative enactment, and that punishment must be imposed unless the jury by their verdict make a contrary disposition. Before that contrary disposition can be made it must be agreed upon unanimously or else the death penalty attaches. We, therefore, see no error in the court's charge in this respect."

It is elementary that, "The purpose of a poll is primarily to determine whether 'there is not unanimous concurrence' of the jury in the verdict as rendered by the foreman." (New Jersey Rules of Practice and Procedure, 3:7-9d; *State* v. *Vaszorich*, 13 N. J. 99, 126).

The purpose of a poll of the jury is to ascertain whether there was unanimity in the *verdict rendered*, and not whether, in a murder case in which the verdict was guilty of murder in the first degree without a recommendation of life imprisonment, there was or was not unanimity of a recommendation.

The New Jersey Supreme Court disposed of this question as follows, and, we think, properly (p. 117 of 17 N. J.):

> "By request to charge Nos. 21, 22 and 23 the court was asked to charge the jury that it must come to an unanimous conclusion as to whether the defendant was to suffer the death penalty and that by unanimous vote the jury must not agree to recommend life imprisonment. This is not the law. State *v.* Bunk, supra.
>
> "The defendant bluntly says, 'The rule laid down by the majority in State *v.* Bunk constitutes judicial legislation * * * and that State *v.* Bunk should be overruled.' We decline to do so."

It is respectfully submitted that the charge as given substantially acceeded to the purpose of the requests and in no way deprived petitioner of any rights guaranteed by due process under the Fourteenth Amendment.

On the question of the jury's power to recommend life imprisonment as the punishment, it is important to note certain fundamental differences between the New Jersey statute and the Federal statute involved in *Andres* v. *U. S.*, 333 U. S. 740, 92 L. Ed. 1055, upon which petitioner strongly relies.

In the *Andres* case, *supra*, there were two Federal statutes involved, 18 U. S. C. A. 454, providing that, "Every

person guilty of murder in the first degree shall suffer death;" and 18 U. S. C. A. 567, providing that:

> "In all cases where the accused is found guilty of murder in first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

It is also to be noted that in the *Andres* case, *supra*, involving the above Federal statutes, as was the case in New Jersey before the adoption of the present statute (amendment of 1919, now N. J. S. 2A:113-4), there is no integration of the life-imprisonment recommendation as a part of the verdict of guilty of murder in the first degree, giving rise, therefore, to the possible ambiguity which, unguarded against by specific charge, could mislead the jury into believing that it was to arrive at conclusions on two separate and sequential issues, namely, one on the question of guilt and the other on the question of penalty.

The error leading to reversal in the *Andres* case was the Court's charge in which it instructed the jury to separate into two distinct operations (1) the finding of guilt of first-degree murder, and (2) the subsequent resolvement of the issue of recommendation or no recommendation in mitigation of the death penalty. The practical result, as determined by the appellate courts, was that such a charge necessitated the finding of the guilty verdict without qualification, if there was in fact a lack of unanimity on the issue of recommendation.

In the instant case, the trial Court expressly told the jury in the language of the statute that the punishment for murder in the first degree was death unless the jury shall

by its verdict and as a part thereof, upon and after the consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. It plainly told the jury that if it determined to make a recommendation of life imprisonment the recommendation "must be included as a part of your verdict." And it instructed that "any verdict rendered" "must be a unanimous verdict."

In the instant case, there was no statutory ambiguity referred to in the *Andres* case, *supra*.

The charge as given was in strict accord with the intendment of the New Jersey statute and with the correct exposition of its terms; and there was no ambiguous language, either in the statute or in the Court's charge, which could possibly mislead the jury on the interpretation of the statute and its functions under said statute.

We therefore, respectfully submit that there is no substance to petitioner's claim that he was denied due process upon this ground.

POINT FOUR.

There was no denial of due process in connection with petitioner's cross examination of State's witness Naomi Boyd.

Naomi Boyd, a State's witness, testified to certain occurences in the Famous Door Tavern on the afternoon of August 22, 1952, and immediately following her departure with petitioner and deceased.

In cross examination, she was asked, "Have you ever been convicted of a crime?" and she said, "Yes." When asked what the crime was, she replied, "Only once in the

Family Court once or twice." (D251a-36). Later the witness admitted she had been convicted in the Family Court "for fighting" (D253a-10).

During the examination, there was considerable discussion between the Court, the Assistant Prosecutor and defense counsel upon the necessity for counsel to be posessed of a record of a crimial conviction. Defense counsel admitted they had no record of any criminal conviction. The Assistant Prosecutor offered to turn over to defense counsel any record of criminal conviction not only of Naomi Boyd but of any other State witness upon request; the Court made the offer to have any records of any court in the county "obtained for you at any time" during the course of the trial, but defense counsel requested that he be furnished "with the record of this witness," if any such record existed (D254a-37 to 255a-17).

Before the close of Naomi Boyd's cross examination, the Court was advised by the Assistant Prosecutor that an examination of the records of the Prosecutor's Office, the Family Court and of the Newark Police Department disclosed that the only conviction of Naomi Boyd took place on March 2, 1950 in the Magistrate's Court when she was "fined $10 and charged with fighting" (D271a-29 to 272a-13). Defense counsel stated they "will have that checked" (D272a-15); and at the conclusion of the entire discussion, the Court made the statement that since "the witness explains something which on its face is not criminal, I am duty bound to strike it and instruct the jury that that is not criminal" (D272a-34, *et seq.*).

The Assistant Prosecutor readily agreed that if there was any record of a criminal conviction against Naomi Boyd he would so stipulate on the record.

But there was no such record; none was produced; and petitioner made no offer of a showing of any kind that Naomi had ever been convicted of crime.

In New Jersey, "fighting" is not a crime, but an offense under the Disorderly Persons Act. (N. J. S. 2A:170-27).

We submit the Court was justified in striking from the record the witness' reply that she had been convicted of "fighting."

The ruling of the trial Court, which we think was a proper one, was that before the examiner can ask whether the witness had previously been convicted of crime, he should be prepared with a record of conviction, or have reliable knowledge of such fact; and if a record is relied upon, the examiner may inquire of the witness as to any matter appearing in such record.

We submit the New Jersey Supreme Court properly disposed of this question as follows (p. 109 of 17 N. J.):

> "The defendant argues that he was improperly limited in his cross examination of the State's witness Naomi Boyd. She was asked whether she had ever been convicted of a crime. Her answer was 'Yes.' Then upon being asked 'What was the crime for which you were convicted?' her answer was, 'Only in the Family Court once or twice' and 'once for fighting.' The assistant prosecutor then objected to further examination unless the defense was prepared to show conviction of a crime. Following a colloquy between the court and counsel the court struck the answers on the ground that there was no evidence that she had been convicted of a crime, since a conviction in the family court and for fighting was not evidence of any conviction of a crime as distinguished from other lesser offenses. Defense counsel admitted he had no information nor any rec-

ord as to the witness having been convicted of crime. The State offered its aid to defense counsel in procuring the record of any conviction of the witness of a crime, if there was any such, and stated that if any record so showed he would stipulate it for the record. Before the close of her cross examination the State advised the court that the records of the prosecutor's office, the family court and the Newark Police Department had been searched and the only record found was that the witness had been charged in police court with fighting and fined $10; that it could not be determined whether the charge was made under an ordinance or the criminal statute. Defense counsel then stated, 'We will have that checked.' The matter was not pursued further by the defense.

"Just what the defendant or the police court meant by 'fighting' is not clear. It could have been some minor offense or simple assault or fighting as defined by R. S. 2:110-4 which is now cognizable under the Disorderly Persons Act, N. J. S. 2A:170-27.

"The statute N. J. S. 2A:81-12, formerly R. S. 2:97-13, provides that the conviction of any crime by a witness may be shown for the purpose of affecting his credibility either by examination or the production thereof.

> " 'Any conviction of crime which has been had against the witness may be shown upon his cross examination; and every question which calls for the disclosure of such a conviction is competent, notwithstanding that it fails to specify the nature of the crime, the time or place of its commission, or the court in which the conviction was had.' State *v.* Fox, 70 N. J. L. 353 (Sup. Ct., 1904).'

"It is not necessary that the cross examiner have in his possession the record of a prior conviction or knowledge thereof, but without such record or bona fide reason to believe to the contrary if the answer

of the witness to the general question is 'No' counsel is bound thereby. If the answer is 'Yes', counsel may examine further to show anything that a record thereof might disclose, State *v.* Rusnak, 108 N. J. L. 84 (E. & A., 1931); State *v.* Metalski, 116 N. J. L. 543 (E. & A., 1936); State *v.* Taylor, 5 N. J. 474 (1950); State *v.* Nagy, 27 N. J. Super. 1 (App. Div., 1953).

"The defense having no record or knowledge of a previous conviction of the witness Boyd, and her answers indicating that she had not been convicted of a crime, it was properly prevented from creating in the minds of the jury a false premise that she had been so convicted and we find no error. State *v.* Cooper, 10 N. J. 532 (1952)."

It is submitted that no denial of due process is shown here.

POINT FIVE.

Petitioner was not deprived of a fair trial because of the alleged avowals of fairness on the part of the prosecution during the trial.

The gist of defendant's argument under this Point seems to be that the Assistant Prosecutor frequently made assertions that the prosecution was trying to be fair which, defendant claims, led to the impression in the jury's mind that the defense was unfair; and that the prosecution's repeated avowals of fairness were inflammatory and prejudicial, with the result that the jury was misled and defendant was deprived of a fair trial.

With this we cannot agree.

We respectfully submit that the trial was conducted by the Court with the utmost decorum and dignity; that the Court was in full control of the proceedings at all times; it asserted its authority whenever necessary; it gave its rulings whenever called upon to do so; and it properly instructed the jury on any question as the circumstances required.

In its main charge, it instructed that, "the jury is required to accept, and is controlled by the principles of law as stated by the Court, even though you may have a contrary view of what the law is or ought to be, or even though you may have required an erroneous or other rule of the law *from anything that has transpired here*" (D1127a-14) (italics ours).

If defense counsel felt that the Assistant Prosecutor had improperly made remarks such as, "I want to be fair," or, "I don't want to take advantage of anyone," or, "I am trying to be fair," or if he remarked in connection with any statement of defense counsel, "I don't think that is a fair statement," or, "I think it is unfair to the witness," or, "I don't want the Prosecutor accused of doing something he should not do," and the like, and if, as defendant claims, any such remarks may have had a prejudicial effect upon the jury, we submit it was the duty of defense counsel to interpose an objection, or to have the remarks stricken from the record and request that the Court admonish the prosecuting attorney, and to have the Court instruct the jury to disregard the objectionable remarks.

But there was no specific objection made to the Court concerning the incidents complained of, as required under the New Jersey Rules of Practice and Procedure (R. R.

3:7-8), and under established law in New Jersey. (*State v. Western Union Telegraph Co.*, 12 N. J. 468, 497-498).

Nor did the matters come within the exception stated in New Jersey Revised Rule 1:5-1(a), that plain errors affecting the defendant's substantial rights may be the basis for reversible error although they were not brought to the attention of the trial court; nor can it be said, under the above-stated Rule, that there "appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury."

We submit the New Jersey Supreme Court adequately dealt with this question by stating (p. 111 of 17 N. J.):

> "There can be no question but what the assistant prosecutor was aggressive, vigorous and zealous in his trial of the cause, as he should have been, but we do not agree with the defendant's contention that in this mode of trial there was created in the minds of the jury the impression that the State was fair in the presentation of its evidence and the defense unfair so that the defendant was thereby prejudiced and deprived of a fair trial. The Prosecutor, on several occasions, characterized the tactics of the defense as 'unfair' and stressed the fact that he was being 'fair,' and the defendant sums up its argument by stating, 'We submit that the characterization, insinuations and innuendoes of the prosecution were so frequent and persistent that the jury was confused, misled and inflamed and that the defendant was deprived of a fair trial.'
>
> "There is nothing in the record which justifies any such assertion and nothing showing the prosecutor's conduct deserving the criticism as tending to becloud the issues and prejudice the accused. A careful perusal of the record, and it is lengthy, re-

veals that the complained of occurrences were infrequent and that on but one occasion did the defendant take an exception to the charge of 'unfairness.' No specific objection was made to the court concerning the instances complained of.

"The trial was conducted by Judge Speakman with decorum and dignity and he was in full control of the proceedings at all times.

"The jury was not prejudiced and we find no violation of the fundamental rights of the defendant."

POINT SIX.

The cross examination of petitioner's wife was not improper; her evidence was not incompetent or prejudicial; and there was no denial of a fair trial.

Petitioner's wife, Alberta Tune, appeared as a defense witness on two occasions; the first in support of petitioner's claim of involuntariness of his confession, and the second on the main case.

On the first occasion, she testified in direct that on the evening of August 23rd, detectives had her accompany them to Newark Police Headquarters. She testified she was at headquarters "About 10 or 15 minutes" (D759a-38); that she was taken to her home where the detectives picked up the clothes her husband had worn the previous night, the 22nd; and she was then taken to Irvington Police Headquarters where she gave the police a written statement.

In cross examination, she stated she saw her husband in Newark headquarters "behind a screen" (D771a-20). She was asked if she talked with her husband. There was an objection to the question upon the ground that it was beyond the scope of her direct examination, and also on

"the matter of relationship." The Court allowed the question to be answered and she replied, "No" (D771a-22 to 35); and again when asked if she had a conversation with her husband, she replied, "No, I didn't have no conversation" (D772a-10).

In further cross examination, she was shown a written statement she had given the police in Irvington Police Headquarters later that same night, and although she acknowledged her signature on it, she said she had not read it (D773a). She admitted she brought her husband cigarettes and a newspaper (D782a-14). She was asked, "When you saw him and you brought him the cigarettes, what did he say about your buying him a newspaper?" To which there was an objection and the Court said, "He may ask her whether he did" (D782a-15 to 21). Then she was asked, "What did he say?" (D782a-23) which was followed by an objection as being beyond the scope of her direct examination and the Court said, "He may ask her whether he asked for it, but the conversation would be incompetent."

Defense counsel, in re-direct, asked the witness if Mrs. McNair had told her that petitioner had said to Mrs. McNair that "he had croaked a man last night," and the witness replied, "No" (D1055a-27).

Then the Assistant Prosecutor asked her, in re-cross, what Mrs. McNair had said to her, and objection to the question was sustained. After the Assistant Prosecutor called to the Court's attention that the witness heard Mrs. McNair say "Something like that," the Court said, "that's a different matter," and the witness replied, "That's all she said and she said she didn't believe him" (D1056a-5).

When the Court questioned the witness on what she meant by "that was all," she replied, "That John Henry

said he believed he and some fellow had a fight, and that was all; * * *" (D1056a-11).

We submit the cross examination was not in anywise improper or prejudicial either as to the manner of examination or the discussion of the Assistant Prosecutor with the Court on any principle of law, in view of the Court's charge that the law must be accepted by the jury from the Court.

Nor was the Court's ruling erroneous in permitting petitioner's wife to testify to what was told her by Mrs. McNair concerning any alleged admissions made by petitioner as tending to contradict the witness' previous testimony, particularly in view of the fact that defense counsel himself had opened the door by asking the witness, in redirect examination, whether Mrs. McNair had told her that petitioner had made any such admission to Mrs. McNair that "he had croaked a man last night;" and the witness replied, "No" (D782a-24 to 29). Then followed a long colloquy between the Court and the Assistant Prosecutor in which the statutory disability of a married woman to testify against her husband was discussed, and the Assistant Prosecutor contended that since defendant's wife was offered as a witness for the defense he had the right to cross examine her on any conversation she may have had with her husband, and also in regard to her statement given by her in Irvington headquarters (D782a-29 to 785a-27).

Petitioner's complaint seems to be that the Assistant Prosecutor should not have engaged in the discussion with the Court in the manner he did, claiming that, "under the guise of arguing on the admissibility of evidence," the Assistant Prosecutor was thereby "informing the jury that testimony was being erroneously excluded by the Court in

sustaining the defendant's objections based on marital relationship" (Db40-40 to Db41-5), with which we cannot agree.

Firstly, petitioner's objection to the last question immediately preceding the colloquy on what the petitioner said to her was sustained by the Court; and secondly, the Court properly cautioned the jury in its final charge that the law in the case should be accepted only from the Court as follows (D1127a-14):

> "* * * and the jury is required to accept, and is controlled by the principles of law as stated by the Court, even though you may have a contrary view of what the law is or ought to be, or even though you may have acquired an erroneous or other rule of the law from anything that has transpired here. You are guided by the law as stated in this charge and you are required to apply it to the facts of the case."

We do not consider it an impropriety for the Assistant Prosecutor to have vigorously discussed with the Court in the presence of the jury the question of the admissibility of evidence of petitioner's wife where she was offered as a witness in his behalf. And we do not consider it as being prejudicial, especially where, as here, the Court emphasized in its final charge that, regardless of any rule of law they may have acquired from "anything that has transpired here," they were required to accept the principles of law "*as stated by the Court.*"

Petitioner's wife resumed the stand in behalf of her husband on his main case. She denied her husband had said anything to her about his having "croaked a man last night" (D1053a-25 to 31).

On cross examination, objections to questions whether her husband had told her "You never miss a good thing till it's over," and whether she asked him if he had killed a man, were sustained (D1053a-36; 1054a-15). She was asked if Mrs. Phyllis McNair had been in her company on the morning of August 23rd, and after objection to the question was overruled, she stated they were together in the kitchen. When asked if Mrs. McNair had talked to her about the petitioner, she replied, "No, sir, I don't remember" (D1055a-6). Petitioner's objection to a question whether Mrs. McNair had told her of petitioner's admission that "he had beaten up a man last night" was overruled, and the Court made the statement (D1055a-11):

> "The Court: I will allow her to answer that. I want to say to the members of the jury now that I am permitting this, not as any proof of the fact, but only in so far as it may tend—that is for you to decide—to contradict this witness' testimony. It is only for that purpose and that purpose alone."

And the witness replied (D1055a-23), "I remember her saying something like that."

This is how the New Jersey Supreme Court disposed of this question which, we think, was proper (p. 112 of 17 N. J.):

> "The argument under this heading relates to the cross examination of the defendant's wife and the allegation that incompetent testimony was admitted which was prejudicial to the defendant.
>
> "She appeared as a defense witness on two occasions: the first in support of defendant's claim of the involuntariness of his confession, and the second on defendant's main case.

"On direct examination she testified she had been at police headquarters for 10 or 15 minutes after her husband's arrest. On cross examination she stated she had seen her husband there. She was then asked if she had talked with him and answered 'No.' On further cross she was shown a written statement she had given the police in order to contradict this, but the court properly refused to allow any conversation between her husband and herself to be testified to.

"Later defense counsel, in re-direct examination, asked Mrs. Tune if Mrs. McNair had told her that the defendant had said to her that 'he had croaked a man last night,' and the witness replied 'No.' The prosecutor then on re-cross asked what Mrs. McNair had said and an objection was sustained. Further questioning elicited the testimony that he (Tune) had said that he believed he and some fellow had had a fight.

"We can find no prejudicial error in the cross examination of Mrs. Tune or in the discussion of the assistant prosecutor with the court, as argued for by the defendant, concerning the statutory disability of a married woman to testify against her husband. Defense counsel himself had opened the door to the complained-of cross examination.

"When the witness was asked if Mrs. McNair had talked to her about the defendant, she replied, 'No, sir, I don't remember.' Defendant's objection to a question whether Mrs. McNair had told her of defendant's admission that 'he had beaten up a man last night' was overruled and the court made the following statement to the jury:

"'I will allow her to answer that. I want to say to the members of the jury now that I am permitting this, not as any proof of the fact, but only insofar as it may tend—that is for you to decide—

to contradict this witness' testimony. It is only for that purpose and that purpose alone.'

"The cross examination was allowable for impeachment purposes and was so limited by the court. See State *v.* Donato, 106 N. J. L. 397, 406 (E. & A., 1930).

"There was no error."

VI.

Conclusion.

For the reasons hereinbefore set forth, we respectfully submit that the petition for the writ of certiorari should be denied.

Respectfully submitted,

CHARLES V. WEBB, JR.,
Prosecutor in and for the
County of Essex, New Jersey,
Of Counsel,
Essex County Court House,
Newark 2, New Jersey.

C. WILLIAM CARUSO,
Special Legal Assistant Prosecutor,
On the Brief.